INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Argument	11
Conclusion	20

CITATIONS

Cases:

Blockburger v. *United States*, 284 U. S. 299	15
Brown v. *Elliott*, 225 U. S. 392	17
Chatwin v. *United States*, 326 U. S. 455	11, 13, 14
Dunn v. *United States*, 284 U. S. 390	20
Gavieres v. *United States*, 220 U. S. 338	15
Gooch v. *United States*, 297 U. S. 124	12, 13
Hohenadel, John, Brewing Co. v. *United States*, 295 Fed. 489	20
Hudspeth v. *McDonald*, 120 F. 2d 962, certiorari denied, 314 U. S. 617	17
Hyde v. *United States*, 225 U. S. 347	17
McDonald v. *United States*, 89 F. 2d 128, certiorari denied, 301 U. S. 697	16
Pinkerton v. *United States*, 328 U. S. 640	17, 19
Poindexter v. *United States*, 139 F. 2d 158	12, 14
Robinson v. *United States*, 175 F. 2d 4	19
Sanford v. *United States*, 169 F. 2d 71	14
Sealfon v. *United States*, 332 U. S. 575	19
Singer v. *United States*, 323 U. S. 338	17
Skelly v. *United States*, 76 F. 2d 483, certiorari denied, 295 U. S. 757	16
United States v. *Coplon*, 88 F. Supp. 912, reversed on other grounds, 185 F. 2d 629	18
United States v. *Dressler*, 112 F. 2d 972	12
United States v. *Falcone*, 311 U. S. 205	15
United States v. *Hutcheson*, 312 U. S. 219	18
United States v. *Nixon*, 235 U. S. 231	18
United States v. *Offutt*, 127 F. 2d 336	17
United States v. *Parker*, 103 F. 2d 857, certiorari denied, 307 U. S. 642	12
United States v. *Petti*, 168 F. 2d 221	19
United States v. *Rabinowich*, 238 U. S. 78	19
Williams v. *United States*, 168 U. S. 382	18

Statutes:

United States Code:	Page
18 U.S.C. 2421	4, 14, 15
18 U.S.C. 371	3, 4, 17, 18
18 U.S.C. 1201	3, 4, 11, 14, 15, 17, 18

Miscellaneous:

F. R. Crim. P., Rule 7(c)	19

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 137

JACK BAZZELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 138

WILLIAM ALONZO LASBY, JR., AND RAYMOND EDWARD RYAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 249-259) is reported at 187 F. 2d 878.

JURISDICTION

The judgments of the Court of Appeals were entered on March 7, 1951 (R. 259-260) and petitions for rehearing (R. 260-272) were denied on April 25, 1951 (R. 272). Orders of May 23, 1951, by Mr. Justice Minton extended the time for filing petitions for certiorari to June 23, 1951 (R. 279). The petitions, No. 137 by Bazzell and No. 138 by Lasby and Ryan jointly, were filed on June 22, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence that a woman was transported by force in interstate commerce to be delivered to a house of prostitution was sufficient to prove a conspiracy to kidnap and the substantive offense of kidnaping within the purview of the Federal Kidnaping Act.

2. Whether the venue for the conspiracy and substantive counts was properly laid in the federal district where the final act of placing the victim in the house of prostitution occurred.

3. Whether petitioners could properly be indicted under the general conspiracy statute rather than the specific conspiracy statute of the Federal Kidnaping Act.

4. Whether the acquittal of the two petitioners in No. 138 on the substantive charges of kidnaping

barred their conviction by the same jury on the conspiracy count.

STATUTES INVOLVED

18 U.S.C. 1201 provides:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.
>
> * * * * *
>
> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a).

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

18 U.S.C. 2421 provides:

> Whoever knowingly transports in interstate * * * commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioners were tried in the United States District Court for the Southern District of Illinois under a three-count indictment. The first count charged the kidnaping, in violation of 18 U.S.C. 1201 (*supra*, p. 3), of one Mildred Tedrick (hereinafter referred to as Tedrick) in Bowling Green, Kentucky, her transportation in interstate commerce to Madison County, Illinois for the purpose of placing her in a house of prostitution, and the fact that she was not liberated unharmed after having been kidnaped (R. 1-2). The second count was identical with the first, but omitted the allegation that Tedrick was not released unharmed (R. 2). The third count alleged a conspiracy by the three petitioners in violation of 18 U.S.C. 371 (*supra*, p. 3) to commit the crime charged in counts 1 and 2 (R. 2-4). The jury found Bazzell guilty on counts 1 and 3, and Lasby and Ryan guilty on count 3, the conspiracy count (R. 9).

Bazzell was sentenced to imprisonment for fifteen years on count 1 and five years on count 3, the sentences to run concurrently (R. 235-236); Lasby and Ryan were each sentenced to imprisonment for five years on count 3 (R. 236-238). On appeal (R. 239, 242-243) the Court of Appeals unanimously affirmed the convictions (R. 259-260) and denied petitions for rehearing (R. 260-272).

The evidence adduced at the trial may be summarized as follows:

In March 1948, after Tedrick had worked for a short time as a waitress in petitioner Bazzell's tavern, he took her to work in a house of ill fame called Club Lujo on Collinsville Road in Illinois (R. 16, 17-18). In coercing her to do this, he threatened her and members of her family, and said that she "was going to work there whether [she] liked it or not because he was short of money" (R. 38, 41, 51-52). Since he demanded the money, amounting to about three or four hundred dollars per week, which she earned at Club Lujo during a two-week period, she was compelled to give it to him (R. 18). Bazzell and another then took Tedrick to work in a house of prostitution at Rock Island, Illinois, where she remained until July, during which time Bazzell continued to collect her earnings (R. 19). After working as a waitress at the Dutch Mill from July 1948 to February 1949, she returned to Club Lujo where she remained

until May, continuing to turn over to Bazzell her earnings as a prostitute (R. 19-20). Later, about July 6, he arranged that she should work for him as a prostitute in a house at 627 Clay Street in Bowling Green, Kentucky, where she remained until December 6, on which date she went to Nashville. She did not return to Bowling Green until December 22 (R. 21-22, 23-24).

On December 6, 1949, when Bazzell arrived at the Bowling Green house of prostitution shortly after Tedrick had left for Nashville, he told Luella Jackson, the madam of the house, that "when he did find [Tedrick] he would whip her for slipping away" (R. 71-72). He also stated that it was going to be "too bad for [Tedrick]" and that "he was going to smack her in the mouth" (R. 90-91).

During Tedrick's sojourn at the Bowling Green house, Bazzell made automobile trips there to collect her earnings, and occasionally she would forward them by money order or telegram (R. 22-23, 71).[1] However, during the period from December 22, 1949, to January 26, 1950, she did not turn over any of her earnings to Bazzell. Her last donation to him had been made around Thanksgiving in 1949. (R. 24.)

On Wednesday, January 25, 1950, at about 7:00 p.m. Bazzell picked up petitioners Ryan and Lasby

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[1] Bazzell denied that Tedrick ever gave him any of her earnings as a prostitute, except on one occasion in March or April 1949 when she loaned him $260 which he needed after having an automobile accident (R. 135, 163).

at Ryan's house in Washington Park, Illinois, and drove them to Bowling Green, Kentucky (R. 140-141, 191-193). Bazzell took the other two petitioners to act as his "muscle men" in bringing Tedrick back to Illinois and paid each of them $50 for his work (R. 224-226).[2] Upon arrival of the three men at the Bowling Green house around midnight, Bazzell ordered Ryan and Lasby, both of whom had their hands in their pockets as if concealing guns, to guard two of the doors, and directed, "If anybody moves, let them have it." When Billy Sanders, one of the prostitutes at the house, started to walk toward the kitchen, Lasby inquired, "Where you think you are going?" and called to Ryan, "Watch her, here she comes." Ryan then watched Sanders while she was preparing some eggs in the kitchen. Although Tedrick protested very vehemently against Bazzell's taking her back to Madison, Illinois, he retorted, "Hell, you are going anyway." Grabbing her by the hair, kicking her on the leg, hitting her on the head, and twisting her arm, he took her upstairs to get her clothes and money, and upon making demand, received from the madam of the house the $36.50 which Tedrick had earned that day. (R. 25-26, 33, 56-58, 73-75, 92-94.)[3] Ryan opened the door for

[2] Bazzell and Ryan testified that Ryan and Lasby accompanied Bazzell just for the ride in order to see the country, even though it was a stormy night (R. 140-141, 192, 201). Lasby did not testify at the trial.

[3] Bazzell denied striking or kicking Tedrick on this occasion, but professed that she came back to Illinois with him voluntarily for the purpose of getting married. He denied taking

Bazzell each time he took some of Tedrick's clothes out to the car (R. 75). Two men in the house were playing cards and did not intervene in the fight (R. 78, 91).

On the automobile return trip from Bowling Green to Illinois, Tedrick sat in the front seat between Bazzell and Ryan, while Lasby sat in the back (R. 27). At the first stop at a restaurant between Bowling Green and Paducah, Kentucky, all four persons got out for a cup of coffee (R. 28, 59, 145-146, 198). At the second stop at a gasoline station in Paducah, the three men got out of the car for about fifteen minutes while Tedrick remained in the car. She testified that the keys had been taken from the car [4] (R. 28, 59-60, 61). When she asked Bazzell why he had not left the keys, he quipped, "What for, for your convenience?" and said "You would not have gotten very far, because Bozo [Lasby] has a German Luger and it will shoot a good block" (R. 69). Further stops were made enroute at a restaurant at Anna, Illinois (R. 28, 61, 147-148, 199), and at a tavern in Chester, Illinois (R. 28-29, 62-63, 148-149, 199). During none of these stopovers did Tedrick attempt to escape.

At about 7:00 a.m. on Thursday, January 26, the

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her earnings; and stated he did not order Ryan or Lasby to guard the doors (R. 141-145). Ryan also denied that Tedrick was taken into the car against her will; that he or Lasby were assigned as guards; and that Bazzell had made the remark about "letting them have it" (R. 198, 201-202).

[4] Bazzell testified that he left the keys in the car with the motor running (R. 146-147, 198-199).

parties arrived at the Green Hat Motel in East St. Louis, Illinois, where Bazzell registered for Tedrick and himself. After her clothes were placed in her room, she remained there and the three men went to a tavern at Fairmount City. (R. 29-30, 149-150, 200.) Around noon, at Bazzell's request, Ryan brought Tedrick from her motel room to the tavern, and Bazzell told her she was to work as a prostitute that night (R. 30, 32, 33, 150). About an hour later Tedrick and Bazzell drove to a filling station in Madison where she telephoned her mother (R. 30-31, 151). Then Bazzell took Tedrick back to the motel where he beat her with a blackjack five or six times "to straighten [her] out for taking off" (R. 31). They spent Thursday night together at the motel room (R. 32).[5] On the night of Friday, January 27, after Bazzell had taken some of Tedrick's dresses to be pressed so that she would be presentable at her work, he drove her to a house at 1010 State Street in Madison, Illinois, where she worked as a prostitute that night (R. 32-33, 101).[6]

Meanwhile, on January 26, shortly after the three men abducted Tedrick from the Bowling Green house, Luella Jackson made a phone call to Greenview, Mississippi, for Catherine Howard, who telephoned Tedrick's mother at Patoka, Illi-

[5] Bazzell denied that he spent Thursday evening at the motel with Tedrick. However, he did admit having a fight with her there on Friday and striking her with his hand to prevent her from throwing an ash tray. Bazzell weighed 190, Tedrick 115 pounds. (R. 152-153, 175).

[6] Bazzell denied having anything to do with Tedrick's going to work at this house of prostitution (R. 153-154).

nois, to tell what had happened. Within an hour Luella Jackson received a phone call about the incident from Tedrick's mother. (R. 75, 80-81, 86.) Also, on January 26, having received a telephone call before noon from the Fayette County sheriff, the Madison County sheriff phoned an F.B.I. agent at Edwardsville, who in turn contacted his regional office at Springfield. The officers spoke to Tedrick's father at Vandalia and to her mother at the Tedrick home at Patoka (R. 109-110, 114-115). There were also teletype communications between the F.B.I. office at Springfield and one of its agents at Bowling Green, Kentucky, who interviewed Luella Jackson (R. 117-118). As a result of these investigations a federal warrant dated January 27, charging kidnaping, was obtained for the arrest of Bazzell (R. 115, 122). On Saturday, January 28, at about 12:30 or 1:30 a.m. several F.B.I. agents and the Madison County sheriff picked up Tedrick at the house of ill fame at 1010 State Street in Madison (R. 102-103, 115). A few hours later at about 4:00 a.m. Bazzell was arrested at his home under the authority of the warrant, and a blackjack [introduced in evidence as Gov. Ex. 1, R. 127-128] was found on his dresser (R. 118-120). Also on January 28 the F.B.I. agents sent Tedrick for an examination by a doctor, who found an injury to the canal of her left ear, as well as contusions on her skull, right ankle, right shoulder, arm, and leg. It was his opinion that the injury to the ear canal and some of the contusions were such that they could

not have been caused by a hand or fist. (R. 11-12, 13, 124.)

ARGUMENT

1. Both petitioner Bazzell (B. Pet. 12-21) [1] and petitioners Lasby and Ryan (L.R. Pet. 19-20) contend that the Government failed to prove a kidnaping under the Federal Kidnaping Act, 18 U.S.C. 1201 (*supra*, p. 3), or a conspiracy to kidnap in that no involuntary seizure and detention within the meaning of *Chatwin* v. *United States*, 326 U.S. 455, 464, were shown. These contentions are without merit.

The requisites for a conviction of the substantive offense under 18 U.S.C. 1201 are (1) interstate transportation of the victim; (2) unlawful seizure; (3) holding of the victim for "ransom or reward or otherwise."

As to the first requirement, there was no dispute as to the interstate transportation of the victim Tedrick from Kentucky to Illinois. Both petitioners Bazzell and Ryan admitted this in their testimony (R. 145-149, 198-199).

Regarding the second phase, there was substantial and convincing evidence of the unlawful seizure and abduction of Tedrick. About a month and a half before the events on which the indictment was founded, Bazzell, highly incensed because Tedrick had left the house at Bowling Green without

[1] We shall refer to Bazzell's brief as "B. Pet." and to the brief of Lasby and Ryan as "L.R. Pet."

his knowledge, had vowed that "when he did find her he would whip her for slipping away" and that "he was going to smack her in the mouth." Tedrick, whose testimony is corroborated by eye witnesses Jackson and Sanders, testified that on the night of the kidnaping she repeatedly refused to return with Bazzell to Madison, Illinois, but that she was kicked, struck, and assaulted by Bazzell to force her involuntary return. To further insure her submission, "muscle men" Ryan and Lasby were guarding the doors to comply with Bazzell's order to "let them have it" in the event any of the bystanders made a suspicious move (see *supra*, pp. 6-8.)

As to the third element, *viz.*, the holding for "ransom or reward or otherwise," the leading case interpreting this language is *Gooch* v. *United States*, 297 U.S. 124, holding that the unlawful restraint of a peace officer to prevent the captor's arrest came within the terms of the Federal Kidnaping Act. This Court, interpreting the statute broadly, held that "Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself." 297 U.S. at 128.[8] Here the indictment

[8] See also the following, where the designated purposes for kidnaping were held to be within the purview of the Act. *Poindexter* v. *United States*, 139 F. 2d 158 (C.A. 8) [to rape the victim]; *United States* v. *Dressler*, 112 F. 2d 972, 974-975 (C.A. 7) [to obtain victim's automobile for purpose of a criminal's escape]; *United States* v. *Parker*, 103 F. 2d 857,

alleged, and the evidence proved, that the holding of the victim was for the purpose of having Bazzell place her in a house of prostitution at Madison, Illinois. Since the record was replete with instances of Bazzell's receipt of Tedrick's earnings as a prostitute prior to the kidnaping, it was reasonable for the jury to infer that his purpose in transporting her from Kentucky to Illinois was to place her in the Madison house where she could earn more money for delivery to him. Tedrick's abduction was, therefore, for a purpose within the purview of the Federal Kidnaping Act under the *Gooch* case, *supra*.

Moreover, it is clear that Tedrick was "held" within the meaning of the Act as interpreted in *Chatwin* v. *United States*, 326 U.S. 455, 460, where it was stated that "[t]he act of holding a kidnapped person for a proscribed purpose necessarily implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim." In the instant case there was an unlawful physical restraint of Tedrick by reason of Bazzell's beatings and his use of physical force in compelling her to go on the trip from Kentucky to Illinois; and a mental restraint because she was aware that Lasby had a German Luger which he would use if she attempted to escape, and that Ryan was

860-861 (C.A. 3), certiorari denied, 307 U.S. 642 [to force victim to confess to a famous crime to enhance reputation of one of defendants as a successful detective].

probably also armed. The "holding" of Tedrick did not require that she be locked in the automobile on the kidnap trip, that she be tied or handcuffed, or that she remain continuously locked in her motel room in East St. Louis up until the time she was delivered by Bazzell to the Madison house of prostitution. Neither was the "holding" negatived by the fact that she did not attempt to escape during the kidnap trip at a time when she was miles from home without money and knew that Lasby would shoot at her if she did flee. (See B. Pet. 17-19; L.R. 19-20.) Such restricted meaning of a "holding" cannot be spelled out of the language of this Court in the *Chatwin* [9] case. See *Sanford* v. *United States,* 169 F. 2d 71, 72 (C.A. 8) holding that the offense was complete under the Act without any "holding" other than that implicit in the kidnaping and interstate transportation of the victim for the purpose of robbing him.[10]

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[9] Although both petitions strongly rely upon the *Chatwin* case (B. Pet. 13-19; L.R. Pet. 19), it is clearly distinguishable from the instant case on the facts. In *Chatwin* there was "no proof [of] an unlawful physical or mental restraint upon the movements of the girl" and "no proof that Chatwin or any of the other petitioners wilfully intended through force, fear or deception to confine the girl against her desires." 326 U.S. at 460. In contrast, here there was abundant proof of both physical and mental restraint of Tedrick.

[10] Without stressing the point very much, petitioners assert that they could not be prosecuted under 18 U.S.C. 1201 because 18 U.S.C. 2421 (*supra,* p. 4) was exclusive (B. Pet. 20-21; L.R. Pet. 20). However, in *Poindexter* v. *United States,* 139 F. 2d 158 (C.A. 8) where two indictments were predicated upon the same transactions (involving a kidnaping for the purpose of rape) and consolidated for trial, consecutive sentences imposed under both the Federal Kidnaping Act and the Mann Act were

Since the elements of the substantive offense were established, the only question on the conspiracy count is whether there was evidence of an "agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States* v. *Falcone,* 311 U.S. 205, 210. In the instant case, Bazzell called for and drove his "muscle men," Ryan and Lasby, directly from Washington Park, Illinois, to the house of prostitution at Bowling Green, Kentucky, where he knew he would find Tedrick. Immediately after the three petitioners entered the house, Ryan and Lasby, their hands in their pockets and apparently holding concealed guns, were stationed to guard the front and side doors. They carried out their function as guards when one of the prostitutes started walking toward the kitchen (see *supra,* p. 7). Ryan opened the door for Bazzell each time he carried out some of Tedrick's clothes to the car. Both Ryan and Lasby accompanied Bazzell and Tedrick on the return trip from Kentucky to Illinois. The jury could infer from the circumstances, including the speed and expedition with which the kidnaping was accomplished, that there was a preconceived,

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affirmed. The offenses involved under 18 U.S.C. 1201 and 18 U.S.C. 2421 are clearly separate and distinct since transportation may be for an immoral purpose without the separate elements of unlawful restraint and holding for reward necessary to establish kidnaping. Cf. *Blockburger* v. *United States,* 284 U.S. 299, 304; *Gavieres* v. *United States,* 220 U.S. 338, 342.

careful plan or conspiracy among the three petitioners as to the procedure which would be followed. The jury could also infer from the place where Tedrick was seized and the place to which she was taken, that Ryan and Lasby knew the purpose of the seizure and the holding.

2. The contentions of the petitioners to the contrary notwithstanding (B. Pet. 21-23; L.R. Pet. 20-21), the federal court for the Southern District of Illinois had jurisdiction of the offenses charged. The final object of petitioners' actions, as embodied in both the substantive and conspiracy counts, was the delivery of Tedrick to the house of prostitution at Madison, Illinois (within the jurisdiction of the Southern District of Illinois). This object had not been consummated when Tedrick was first brought from Kentucky to the Green Hat Motel in the Eastern District of Illinois (see B. Pet. 22). The substantive offense and the criminal conspiracy necessarily continued until its final object had been accomplished. Cf. *McDonald* v. *United States,* 89 F. 2d 128, 133 (C.A. 8), certiorari denied, 301 U.S. 697; *Skelly* v. *United States,* 76 F. 2d 483, 488-489 (C.A. 10), certiorari denied, 295 U.S. 757.

Even though there was no evidence that Lasby or Ryan committed any overt acts in the Southern District of Illinois (see L.R. Pet. 20-21), they were chargeable with the later overt act of their coconspirator Bazzell in taking Tedrick to the Madison house since the conspiracy had not terminated

upon their arrival at the Green Hat Motel in East St. Louis. As this Court said in *Pinkerton* v. *United States,* 328 U.S. 640, 646-647: "And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.' *United States* v. *Kissel,* 218 U.S. 601, 608." Venue in conspiracy may properly be laid either where the conspiracy was formed or where any overt act in furtherance thereof was committed. *Hyde* v. *United States,* 225 U.S. 347; *Brown* v. *Elliott,* 225 U.S. 392, 400; *Hudspeth* v. *McDonald,* 120 F. 2d 962, 966 (C.A. 10), certiorari denied, 314 U.S. 617.

3. There is no merit in the assertion by petitioners Lasby and Ryan (L.R. Pet. 13-17) that the specific conspiracy provision of 18 U.S.C. 1201 (c) repealed by implication the general conspiracy statute, 18 U.S.C. 371, mentioned in the indorsement on the indictment as the basis for the third count, so that there was no valid conspiracy charge under which they could be convicted. Although this Court apparently has not passed directly upon this question,[11] it is a well-established rule that

[11] See *Singer* v. *United States,* 323 U.S. 338, 343, where the Court noted, in considering Section 11 of the Selective Training and Service Act of 1940 [which had its own conspiracy clause] that it had been assumed in *United States* v. *Offutt,* 127 F. 2d 336 (C.A. D.C.) that conspiracies to violate Section 11 could still be prosecuted under the general conspiracy statute. However, the Court did not decide this point. A lower court decision in the Southern District of New York,

repeals by implication are not favored. Both sections are couched in almost identical language and require the same proof. While Section 1201(c) provides for a potentially more severe penalty than Section 371, the sentences imposed upon all three petitioners were within the limits of either statute.[12]

Even if it be conceded *arguendo* that there was an implied repeal of Section 371 by Section 1201 (c), petitioners' convictions would still have to be affirmed. The indorsement on the indictment of Section 371 was not a part thereof and did not affect its legal force. As this Court observed in *Williams* v. *United States,* 168 U.S. 382, 389: "We must look to the indictment itself, and if it properly charges an offence under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offence charged was covered by a different statute." Cf. *United States* v. *Hutcheson,* 312 U.S. 219, 229; *United States* v. *Nixon,* 235 U.S. 231, 235. Therefore, if the indictment actually charged an offense under Section 1201(c), even though Section 371 had been erroneously indorsed thereon, the petitioners' conviction for the conspiracy proscribed by Section 1201

United States v. *Coplon,* 88 F. Supp. 912, 914 (reversed on other grounds, 185 F. 2d 629 (C.A. 2), pending on petition for certiorari, No. 4, O.T. 1951), is adverse to the argument advanced here by petitioners.

[12] It is anomalous to find petitioners complaining that they should have been tried under Section 1201(c) instead of Section 371, when this would have made possible the imposition of a much more severe sentence.

(c) would have been proper. See Rule 7(c), F.R. Crim. P.

4. Finally, petitioners Lasby and Ryan are in error in taking the position that since they were acquitted on the substantive counts, they could not at the same time be convicted on the conspiracy count (L.R. Pet. 17-18). This completely overlooks settled law to the effect that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States,* 328 U.S. 640, 643; *United States* v. *Rabinowich,* 238 U.S. 78, 85.

The strong reliance placed upon *Sealfon* v. *United States,* 332 U.S. 575 (L.R. Pet. 17-18), is misplaced. That case involved identical basic facts in two separate trials, in the first of which petitioner was acquitted on a conspiracy charge and in the second of which he successfully raised the defense of *res judicata* to the substantive charge. Here the conspiracy and substantive charges were disposed of at the same, not different trials. This distinction precludes application of the *Sealfon* doctrine. *Robinson* v. *United States,* 175 F. 2d 4, 9-10 (C.A. 9); *United States* v. *Petti,* 168 F. 2d 221, 224 (C.A. 2). Furthermore, the Court in *Sealfon* was aware that it was dealing with a unique situation predicated upon a peculiar set of facts, and recognized (332 U.S. at 578) the rule of *Pinkerton* v. *United States,* 328 U.S. 640, 643, that ordinarily the commission of a substan-

tive offense and a conspiracy to commit it are separate and distinct, and that with a few exceptions, a person may be prosecuted for both crimes.[13]

CONCLUSION

The case involves no conflict or question of general importance. It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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SEPTEMBER 1951.

[13] Petitioners also discuss *John Hohenadel Brewing Co.* v. *United States*, 295 Fed. 489 (C.A. 3), but they have inadvertently misstated the facts (L.R. Pet. 17). That case involved seven substantive (no conspiracy) liquor violation counts, not two counts for receiving and possessing stolen property, as stated by petitioners. There was an acquittal on the first six counts and a conviction on the seventh. The court held that the verdict of guilty on the seventh count had to be based upon evidence other than that supporting the first six counts, or otherwise the verdict would be inconsistent; and then found that there was such additional evidence in affirming the conviction. Apart from the obvious factual differences between that case and the instant one, it is at variance with the rule of *Dunn* v. *United States*, 284 U.S. 390, 393, *viz.*, that consistency in a jury verdict is not necessary, each count in an indictment being regarded as if it were a separate indictment.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 957076 230

INDEX.

	Page
Petition for rehearing	1–6
Reasons for granting rehearing and issuing the writ	2–6
Conclusion	6

Case Cited.

United States v. Bazzell, 187 F. (2d) 878, 886	2

Rule Cited.

Federal Rules of Criminal Procedure, Rule 30	5, 6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 137.

JACK BAZZELL,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING
Of Order Denying Petition for Writ of Certiorari.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Jack Bazzell, respectfully prays that this Court grant rehearing of its order of October 15, 1951, denying the petition for writ of certiorari in the above-entitled cause, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in this cause as prayed for in the petition filed June 21, 1951, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

A matter which has not previously been submitted to this Court in the petition for a writ of certiorari is the question as to the propriety of the instructions read to the jury by the trial Court in this case. This matter was raised by appellants before the United States Court of Appeals for the Seventh Circuit, but that Court in its opinion states that the question of the instructions was not argued in the brief or in the oral argument, and that further the record did not disclose that any objection or challenge was made to the trial Court's instructions, and there were no additional instructions offered to the Court for presentation to the jury. United States v. Bazzell, 187 F. (2d) 878, 886. It is the firm and sincere contention of this petitioner, however, that such substantial rights are involved in this cause and so unusual were the instructions given by the trial Court that the Court of Appeals ought with propriety have reviewed them with care, and that in the absence of such review by the Court of Appeals, this Court should grant certiorari in order to review the vehement and unwarranted instructions given below.

These instructions are set out in full at page 228 of the transcript of the record in this cause. The shorthand reporter has evidently erred in setting forth the instructions of the Court under the heading of "Closing Arguments." The beginning of the instructions, however, clearly show that the statements are being made by the Court. Even after first glance, nevertheless, it is difficult to distinguish between these alleged instructions and a vigorous prosecutor's argument to the jury. For example, there is in effect no presumption of innocence instruction given to the jury. The trial judge instructed as follows:

> "The defendants have pleaded Not Guilty, and it is for the jury to determine whether they are guilty.

> The defendants are presumed to be innocent and that presumption of innocence remains with them throughout the trial, and the burden is upon the Government at all times to establish the guilt of the defendants beyond a reasonable doubt and to a moral certainty. Whoever aids or abets is **just as guilty.** You may also consider **that law** in determining whether the defendants are **guilty.**" (Emphasis ours.)

It must be obvious that such a confused and jumbled instruction renders the attempt of the Court to give a presumption of innocence instruction completely nugatory. Any advantage that the defendants may have obtained by the instruction as to the presumption of innocence is eradicated entirely by the Court's statement in the same paragraph that an abettor is "just as guilty," which statement certainly implies and in effect tells the jury to believe that these defendants actually are guilty.

Similarly, with regard to the matter of "reasonable doubt" the Court also told the jury that they must return a verdict of guilty. For the Court said (R. 229):

> "A reasonable doubt is said to be a doubt that would cause a reasonably prudent person to hesitate or pause in the more important affairs of life before acting. You are not required to believe the defendants guilty beyond all possibility of a doubt, but the doubt must be reasonable, and **you must not go outside of the evidence for possible doubt upon which to base a verdict of not guilty.**" (Emphasis ours.)

Certainly such an instruction is completely foreign to all of the established principles of criminal jurisprudence which place upon the prosecution the burden of proving the crime charged, and this instruction completely deprives the defendant in a criminal trial of any semblance of a fair and impartial hearing by jury. This instruction indeed places a severe burden upon the defendant and is

a complete departure and abuse of the Court's privilege of commenting upon the evidence presented.

Furthermore, although the Court sets out specifically the allegations of the Government in this case, nowhere in the charge to the jury is the defendant's contentions and theory of the case presented. The defendant is certainly entitled in a fair charge to the jury instructions upon the law as applied to the evidence presented by him. Nor should it be of any consequence that no request for such instructions may have been made. For these are not instructions of a cautionary nature, but to the contrary it is the duty of a trial Court to instruct on all substantive issues in the case.

Further indication of the prejudice shown by the trial Court may be seen in that part of the instruction which deals with circumstantial evidence (R. 230):

> "In the determination of any particular fact which constitutes the elements of this crime, the jury are at liberty to consider the circumstances, and if the circumstances are sufficient to convince you of a given fact; even though no direct evidence upon that fact, you would be at liberty to find it was a fact if the circumstances lead you to the conclusion that the facts are true, you may under those circumstances find the given fact."

Can it be said that this instruction even remotely sets forth the law as it applies to circumstantial evidence? There is no reference whatever to the necessity of circumstantial evidence excluding any reasonable hypothesis of innocence in order to be considered evidence against the defendant. It is a mere statement that the jury is to consider seriously any minute particle of evidence, no matter how circumstantial or inconsequential, and to take all such matters into consideration and to find the defendant guilty.

And finally the summation of the instruction reads as follows (R. 230-231):

> "It is your duty to sift the chaff from the truth. That is your exclusive province. You are intelligent jurors and will have no great difficulty in determining where the truth lies. Let your verdict speak the truth and **nobody will be done any injustice. . . . You would not have to find the verdict of guilty on both of these counts.** I have a form of verdict here. I caution you very seriously to get it in proper form if you find the defendant or one or more of them guilty. **You will have to fill in the names of the defendants and the counts upon which you find them guilty or not guilty.**" (Emphasis ours.)

With regard to this instruction, petitioner is not quibbling with regard to the niceties of phraseology of instructions. It must appear obvious to the contrary that this instruction is an impassioned plea that the jury find the defendants guilty. The Court is telling the jury that they do not have to find the defendant guilty of all counts, but it will be sufficient that they find him guilty on one count.

This is a case wherein the petitioner received a sentence of fifteen years imprisonment on one count and five years imprisonment on another count, which latter sentence is to run concurrently. Certainly in a case as serious as this, where a man's liberty is involved, a petitioner to this Court should not be precluded by Rule 30 of the Federal Rules of Criminal Procedure from obtaining appellate review of contentions such as are set out herein. The United States Court of Appeals has stated that, under the state of the record in this case, it could see no cause for reversal of the decision of the trial Court. Such a statement is an incorrect interpretation of the principle of law which states that an appellate Court, in a case involving life or liberty, may notice and correct serious error, plainly prejudicial

to the defendant, in the trial Court's instructions to the jury, even though the same is not called to the Court's attention. This not having been done by the Court of Appeals, this Court should review the instructions given below and render a determinative ruling as to the scope and applicability of Rule 30 of the Federal Rules of Criminal Procedure, and as to whether said rule precludes a defendant from raising in the appellate Courts objections to instructions which contain defects so substantial as to completely deprive the defendant of his right to a fair and impartial trial by jury.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

.....

MORRIS A. SHENKER,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

.....

Morris A. Shenker,
Counsel for Petitioner.

End